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WARREN E. BURGER: AN INDEPENDENT PRAGMATIST REMEMBERED

James L. Volling†

I. INTRODUCTION

In December of 1979, I was living in a Virginia suburb of Washington, D.C., and serving as a law clerk to Judge Roger Robb of the United States Court of Appeals for the District of Columbia Circuit. For Christmas, my wife gave to me the popular book for lawyers that year—*The Brethren: Inside The Supreme Court* by Bob Woodward and Scott Armstrong.[1] I was hoping to remain in Washington for another year, having applied to become one of Chief Justice Warren E. Burger's law clerks for October Term 1980. I was elated when I received the telephone call on New Year's Day of 1980 informing me that I had been selected as a law clerk to the Chief Justice. However, during the following weeks when I began reading the unflattering and unfair portrayal of Warren Burger in *The Brethren*, I became somewhat concerned about my future employment. I spoke with Judge Robb about the man I would come to know simply as "the Chief," and Judge Robb assured me that I would find him to be warm, generous, and engaging. Indeed, he was. My year with the Chief taught me much about law and life. He

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1. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

was mentor and friend to his law clerks, and his passing has left a great void for me personally and for the entire "law clerk family."

The impression Chief Justice Burger made on America's legal institutions and jurisprudence will be indelible. His career, spanning more than sixty years, was nothing short of remarkable. While many have described his skills as a lawyer, his love of history, his incomparable administrative talents, and his tireless dedication to the work of his high office, I believe that his greatness also can be found in his character and philosophy as a jurist. Above all, Chief Justice Burger understood the importance of tempering abstract legal tenets with practicality. He approached his awesome responsibilities as the nation's fifteenth Chief Justice with an independent mind and a deep reverence for the law and the proper role of the courts. In the words of one of his former colleagues on the United States Court of Appeals for the District of Columbia Circuit, Chief Justice Burger "was not an ideologue, and his opinions reflect the experience and common sense that he brought to bear on national problems."[2]

Warren Earl Burger was born on September 17, 1907, in Saint Paul, Minnesota. He was one of seven children of Charles and Katharine Burger. The family, living on a twenty-one-acre truck farm outside of Saint Paul, was of modest means. Charles Burger supplemented his income by selling weighing scales, and the children were expected to do their share as well. It was during these early years that Warren Burger first developed his lifelong appetite for hard work. He earned extra money while attending public high school by selling articles on school sports and other news to the Saint Paul newspapers. He also found time to excel at his studies and at a variety of extracurricular activities.

Warren Burger financed his formal education after high school by taking a job as an insurance salesman for the Mutual Life Insurance Company of New York. The future Chief Justice completed his academic requirements at night by attending the University of Minnesota's evening division for two years and then enrolling in night classes at the Saint Paul College of Law (now

2. George E. MacKinnon, *in A Tribute to Chief Justice Warren E. Burger*, 100 HARV. L. REV. 969, 993 (1987).

William Mitchell College of Law), from which he graduated with high honors and to which he returned as an adjunct faculty member for twelve years.

Admitted to the Minnesota bar in 1931, Warren Burger immediately joined one of the fine law firms in Saint Paul, where he became a partner after only two years. He continued in general law practice until 1953, when he was appointed by President Eisenhower as an assistant attorney general of the United States to head the Claims Division, one of the largest divisions in the Department of Justice. In that capacity, he distinguished himself in a group of outstanding lawyers, including Attorney General Herbert Brownell, future Secretary of State William Rogers, and other nationally prominent assistant attorneys general. Departing from the usual practice of division heads, Warren Burger argued many important cases in trial and appellate courts, and in 1955, he was selected by the Attorney General to argue *Peters v. Hobby*[3] in the United States Supreme Court. He also received acclaim for his success in litigation against Aristotle Onassis and other shipping magnates, which was achieved through the innovative creation of jurisdiction for the United States courts over Greek-owned ships in international waters and which netted the United States government the then-considerable sum of ten million dollars.

After three years at the Department of Justice, Warren Burger tendered his resignation, intending to return to Saint Paul to resume the private practice of law. Those plans were forestalled in 1956 when President Eisenhower persuaded him to remain in Washington and appointed him to the influential United States Court of Appeals for the District of Columbia Circuit. At this time, the federal courts of the District of Columbia were vested with the broadest jurisdiction of any court in the land, functioning as the equivalent of state courts for the District itself, as well as having the regular jurisdiction of other federal courts. In addition, cases from all federal agencies could also be appealed to the District of Columbia Circuit. This situation created a unique mix of cases ranging from common felony crimes to highly technical issues of federal law, a microcosm of all facets of American jurisprudence within one circuit.

Judge Burger quickly found himself embroiled in the

3. 349 U.S. 331 (1955).

important controversies regarding the criminal law that were sweeping the nation at the time. His opinions, whether in the majority or in dissent, held to the view that solicitude for the rights of the accused must be balanced with the need to enforce the law. Yet, Judge Burger was reluctant to press for the wholesale overruling of prior decisions, preferring instead to curtail their reach while preserving their jurisprudential essence.

This approach was evident in the per curiam opinion that Judge Burger authored in *McDonald v. United States*,[4] which revisited the rule promulgated some years earlier by Judge Bazelon in *Durham v. United States*.[5] The *Durham* court, responding to advances in the field of psychiatry, had rejected the long-standing rule in *M'Naghten's Case*[6] and held that a jury could find a defendant not guilty by reason of insanity if his acts were the product of a "mental disease or defect,"[7] a result that many commentators believed was fraught with possibilities for abuse. *McDonald* left the basic rule of *Durham* intact, while drastically restricting its scope by defining "mental disease or defect" narrowly.[8]

Judge Burger's opinions in *McDonald* and in other cases "established him as a leader on his court and throughout the nation in the fight for judicial decisions that were not based on technicalities."[9] This reputation was further cemented by a speech he gave at Ripon College in 1967, which received national media attention. Comparing the American criminal justice system with that of the Scandinavian countries, Judge Burger found it wanting. His recommendations for reform delivered in the Ripon College speech were frequently quoted by the 1968 Republican Party candidates.

When in 1969 President Nixon was faced with the vacancy on the Supreme Court occasioned by the retirement of Chief Justice Earl Warren, he turned to Warren Earl Burger. Following the unanimous endorsement of the Judiciary Committee, he was speedily confirmed by the Senate, and sworn in as the fifteenth Chief Justice of the United States on June 23, 1969.

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4. 312 F.2d 847 (D.C. Cir. 1962).
5. 214 F.2d 862 (D.C. Cir. 1954).
6. 8 Eng. Rep. 718 (1843).
7. *Durham*, 214 F.2d at 874-75.
8. *McDonald*, 312 F.2d at 851.
9. MacKinnon, *supra* note 2, at 991.

Thus, at age sixty-two, when many lawyers contemplate retirement, Warren Burger embarked on a new career in America's highest judicial office with all of its manifold duties. His broad background of forging his own way from an early age through prodigious effort and ingenuity, of twenty-five years of private and public law practice focused on a vast array of problems, and of thirteen years on the federal appellate bench on a court of extensive jurisdiction and great impact, clearly shaped his approach to the difficult legal issues he encountered as Chief Justice. His judicial philosophy was borne, not out of some agenda or ideology, but out of careful analysis of each case and each issue on the merits with due regard for the appropriate and limited role of the third branch of the United States government. That judicial philosophy is best characterized by the traits of independence and pragmatism that were so much a part of Warren Burger's personality. What follows are some examples of a jurisprudence of independent pragmatism brought to bear by Chief Justice Burger on critical subject areas during and after his tenure on the Court.

II. CRIMINAL JUSTICE

Considering his "law-and-order" reputation, there were many pundits who expected that, as Chief Justice, Warren Burger would strive to overturn the landmark criminal law decisions of the Warren Court. But neither those who hoped for this outcome, nor those who feared it, took adequate account of the new Chief Justice's respect for precedent and the doctrine of *stare decisis*. Chief Justice Burger simply cared too deeply for the great institution that is the Supreme Court of the United States to allow its decisions articulating our nation's highest law to be tossed aside based upon a shift of political winds or a change in judicial personnel.

On the Supreme Court, his approach to major criminal law precedents such as *Miranda v. Arizona*[10] and *Mapp v. Ohio*[11] resembled the way he handled cases like *McDonald* on the Circuit Court of Appeals. He preferred to leave the rulings intact, while defining their outer limits. For example, Chief Justice Burger held that a statement otherwise inadmissible under the *Miranda*

10. 384 U.S. 436 (1966).
11. 367 U.S. 643 (1961).

rule could be used to impeach a defendant's credibility at trial,[12] and he joined in opinions establishing a "public safety" exception to *Miranda*[13] and concluding that a confession obtained in violation of *Miranda* did not taint a second, valid confession.[14] Similarly, the Court led by Chief Justice Burger trimmed the exclusionary rule of *Mapp* by carving out "good faith exceptions"[15] and expanding the "reasonableness" doctrine[16] introduced by the Warren Court in *Terry v. Ohio*.[17]

While seeking balance in the criminal law, Chief Justice Burger never abandoned the fundamental principle that our law must protect the individual from the excessive exercise of government power. As one of my law clerk colleagues has observed:

> He respected the prerogatives of the other branches of government; he disapproved of reversing criminal convictions for artificial or insubstantial reasons; he did not believe in hindering police in performing legitimate law enforcement functions. At the same time, he proclaimed clearly and repeatedly that he would never vote to overrule *Miranda*, because to do so would be an invitation to lawlessness by law enforcement authorities.[18]

Indeed, in *Estelle v. Smith*,[19] Chief Justice Burger wrote the majority opinion establishing the right of a convicted murderer to exclude at the sentencing phase of his capital trial testimony based on psychiatric interviews conducted without *Miranda* warnings and without the assistance of counsel. Although possible to rely on Sixth Amendment grounds alone, the Chief Justice did not shrink from employing the Fifth Amendment and

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12. Harris v. New York, 401 U.S. 222 (1971).
13. New York v. Quarles, 467 U.S. 649 (1984).
14. Oregon v. Elstad, 470 U.S. 298 (1985).
15. *See* United States v. Leon, 468 U.S. 897 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984).
16. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325 (1985) (holding that a public school official may search a student's locker if a reasonable basis exists for believing the search will produce evidence of a rule violation); Illinois v. Lafayette, 462 U.S. 640 (1983) (holding that a police search of an arrestee's personal effects is a reasonable part of routine procedure); South Dakota v. Opperman, 428 U.S. 364 (1976) (holding that a routine police search and inventory of an impounded car is reasonable).
17. 392 U.S. 1 (1968).
18. Alex Kozinski, *in A Tribute to Chief Justice Warren E. Burger*, 100 HARV. L. REV. 969, 977-78 (1987).
19. 451 U.S. 454 (1981).

the *Miranda* rule to fully address the governmental conduct at issue in *Estelle v. Smith* and to declare that conduct unconstitutional. Likewise, he demonstrated his commitment to stability in the law as a jurisprudential value by his reaffirmation of *Massiah v. United States*[20] through his majority opinion in *United States v. Henry*,[21] and by his observance of Fourth Amendment dictates in his opinion for the Court in *United States v. Chadwick*.[22] He also concurred in decisions extending to misdemeanor cases the right of indigent defendants to counsel[23] announced in *Gideon v. Wainwright*,[24] and expanding *Griffin v. Illinois*[25] to ensure a defendant's right to a psychiatrist if necessary for his defense.[26]

As one commentator has aptly noted, "the anticipated Burger Court counterrevolution in criminal procedure never materialized."[27] That is true in large measure because of Chief Justice Burger's practical judicial philosophy of not dismantling settled precedents but, rather, of refining them to achieve equilibrium without sacrificing fundamental fairness or yielding excessive authority to government.

III. DISCRIMINATION

Warren Burger was devoted to public affairs from the outset of his legal career. Apart from his service as president of the Saint Paul Junior Chamber of Commerce and as trustee of the world-famous Mayo Foundation, of Macalester College, and of the Saint Paul College of Law, his concern about the evil of racial discrimination led him to help organize and become the first president of the Saint Paul Council on Human Relations. Because he believed that all aspects of the American legal process should reflect the law's core values, one of his initiatives was the Council's sponsorship of police training programs to improve relations with minority groups.

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20. 377 U.S. 201 (1964).
21. 447 U.S. 264 (1980).
22. 433 U.S. 1 (1977).
23. Argersinger v. Hamlin, 407 U.S. 25, 41 (1972) (Burger, C.J., concurring).
24. 372 U.S. 335 (1963).
25. 351 U.S. 12 (1956).
26. Ake v. Oklahoma, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring).
27. Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1441 (1987). *See generally* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983) (presenting a series of commentaries).

Following the bombing of Pearl Harbor in 1941, American hatred for the Japanese was intense, and there was great public pressure to relocate forcibly California's Japanese-Americans. As a conscientious young lawyer in Minnesota, Warren Burger believed that the constitutional rights of those individuals should not be sacrificed to popular passion. He organized and headed a committee of the Saint Paul Council on Human Relations to help resettle some of the Japanese-Americans who were being forced from their homes. He even opened his own home to one family for nearly a year while the father looked for work. His actions met with resistance in his community. Nevertheless, he persevered and did what he could to rectify a grave injustice. Years later, in 1974, this effort was again brought to mind when Chief Justice Burger was lecturing in Tokyo, Japan, and he received an unexpected visit from a Japanese woman whose family in 1941 had been forced from their home in California when she was only two years old. She was now living in Tokyo with her husband, an airline employee, and she was grateful that her family had been taken in by a thirty-four-year-old, compassionate Minnesota lawyer who had become Chief Justice of the United States.[28]

In addition to his work on the Saint Paul Council on Human Relations, Warren Burger served for many years on the Minnesota Governor's Interracial Commission. These experiences, together with his openness to other cultures and his recognition of the dignity and potential of every person regardless of race, gender, or background, undoubtedly shaped his analysis of discrimination issues that came before the Supreme Court during his seventeen-year tenure as Chief Justice.

Compared with the blatant and egregious segregation confronted by the Warren Court in cases such as *Brown v. Board of Education*,[29] "[t]he issues faced by the Burger Court in school desegregation cases were far less simple, with values such as local control over education, and concerns over the well-being of school children, often at odds with the goal of racial equality."[30] The post-*Brown* desegregation cases became increasingly complex

28. Mark W. Cannon, *in A Tribute to Chief Justice Warren E. Burger*, 100 HARV. L. REV. 969, 985-88 (1987).

29. 347 U.S. 483 (1954).

30. Bruce E. Rosenblum, *Warren E. Burger and the School Desegregation Cases*, 45 OKLA. L. REV. 93, 118 (1992).

as the more insidious aspects of racial discrimination began to be addressed. District courts were drawn with greater frequency into complicated questions of quotas, racial balance, redrawing school district lines, busing, and attendance zones. Many questioned the propriety of the courts' involvement in these matters, and there was concern in some quarters that Chief Justice Burger would be hostile to desegregation efforts. He put any such concern to rest, however, with his opinion for a unanimous Court in *Swann v. Charlotte-Mecklenburg Board of Education*,[31] which was "a complete endorsement of a comprehensive desegregation order" and "a sweeping confirmation of the federal courts' powers to enforce *Brown*'s mandate of desegregation."[32]

Although his general opposition to racial discrimination was deep and traceable back to his early days as a lawyer in Saint Paul, Chief Justice Burger did not concede that the power of the federal courts to end segregation was absolute. Consistent with his view of the proper role of Article III courts in our constitutional system, the Chief Justice delivered the Court's opinion in *Milliken v. Bradley*,[33] which struck down an inter-district remedy for segregation in the schools of the city of Detroit because that remedy was not constrained so as to address "the condition that offends the Constitution."[34] *Milliken* stood as a limitation on the federal courts' powers "predicated on principles of federalism and local autonomy."[35] Indeed, when Chief Justice Burger did not side with the majority in desegregation cases, "it was generally on the grounds that the boundaries of judicial authority had been exceeded."[36] This approach of seeking jurisprudential equipoise through common-sense weighing of competing interests in the context of federalism was the hallmark of Warren Burger's judicial philosophy.

In other civil rights cases, Chief Justice Burger upheld congressional set-asides of a percentage of public works funds for minority businesses;[37] invalidated state aid to racially-segregated

31. 402 U.S. 1 (1971).
32. Rosenblum, *supra* note 30, at 101, 118.
33. 418 U.S. 717 (1974).
34. *Id.* at 738.
35. Rosenblum, *supra* note 30, at 118.
36. *Id.*
37. Fullilove v. Klutznick, 448 U.S. 448 (1980).

private schools;[38] held that artificial and arbitrary barriers to employment cannot withstand Title VII scrutiny if such non-job-related devices discriminate against protected minorities;[39] and sustained the Internal Revenue Service's denial of tax exemptions to private schools that practiced racial discrimination.[40] With respect to the rights of women,[41] he authored opinions striking down a state statute giving preference to men over women as estate administrators,[42] and applying Title VII's prohibition of sex discrimination to law firm partnership decisions.[43] In addition, he voted to end gender classifications in Social Security dependent benefits[44] and in jury selection.[45] These actions, while perhaps surprising to some, were wholly in accord with Warren Burger's personal values and experience.

IV. SEPARATION OF POWERS AND STATUTORY INTERPRETATION

The working of American government was a subject of enormous interest to Chief Justice Burger. He appreciated fully the concerns of the Framers that led to a constitutional scheme that separates governmental powers among competing and mutually-restraining legislative, executive, and judicial branches. Surely no other modern Chief Justice has been called upon to wrestle with so many critical issues relating to the separation of those powers as Warren Burger.

It is incontrovertible that history will likely view Chief Justice Burger's opinion for a unanimous Court in *United States v. Nixon*[46] as the most significant of his career, perhaps as one of the most important opinions written by any Justice. The *Nixon* decision not only changed the course of contemporary history and resulted in the resignation of a President, but also reaffirmed the core value of a co-equality among the coordinate branches. Recalling the landmark opinions of Chief Justice John

38. Norwood v. Harrison, 413 U.S. 455 (1973).
39. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
40. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).
41. Women were an important part of Warren Burger's life, including his beloved wife Vera, daughter Margaret Mary, and daughter-in-law and granddaughters through his son Wade.
42. Reed v. Reed, 404 U.S. 71 (1971).
43. Hishon v. King & Spalding, 467 U.S. 69 (1984).
44. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).
45. Taylor v. Louisiana, 419 U.S. 522 (1975).
46. 418 U.S. 683 (1974).

Marshall which laid the legal foundation for our federal government, Chief Justice Burger applied the venerable principle that no one, regardless how lofty his station, is above the law. While acknowledging and preserving the doctrine of executive privilege, the Chief Justice concluded that

> To read the Art[icle] II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art[icle] III.[47]

Because President Nixon's generalized assertion of privilege could not prevail over the fundamental demands of due process of law in the fair administration of criminal justice, it had to "yield to the demonstrated, specific need for evidence in a pending criminal trial."[48] Those who may have expected or feared blind loyalty to the man who had appointed Warren Burger to the office of Chief Justice were sorely disappointed; what they witnessed instead was unswerving adherence to bedrock elements of American jurisprudence, utilized in a pragmatic, evenhanded fashion to avert a constitutional crisis.

Chief Justice Burger's fidelity to the separation of powers mandated in the Constitution was displayed again in his seminal opinion for the Court in *INS v. Chadha*,[49] which invalidated the one-house legislative veto. For over a half-century, Congress's practice had been to pass legislation imposing duties on the executive branch, but with the proviso that either house of Congress could veto a specific action of the executive branch department involved. By 1983, more than 200 federal statutes contained such provisions. Striking down the device as unconstitutional, Chief Justice Burger admonished, "With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."[50] While wide in its impact, the Chief Justice's opinion in *Chadha* vindicated a concept both

47. *Id.* at 707.
48. *Id.* at 713.
49. 462 U.S. 919 (1983).
50. *Id.* at 959.

simple and fundamental to the constitutional architecture wrought by the Framers: for measures to be enacted into law, they must pass through two branches of government and not remain within the exclusive province of the Article I branch.

Separation-of-powers concerns also lay at the heart of Chief Justice Burger's renowned dissent in *Bivens v. Six Unknown Federal Narcotics Agents*,[51] the case that gave rise to a federal constitutional tort for violations of the Fourth Amendment:

> I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.[52]

The Chief Justice lamented the flaws in the exclusionary rule and that there was "virtually no evidence that innocent victims of police error . . . have been afforded meaningful redress,"[53] but his common-sense solution was to call upon "Congress [to] develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated."[54]

Fittingly, Chief Justice Burger spoke to the separation-of-powers principles he held so dear on the final day he sat as an active member of the Supreme Court. He delivered the Court's opinion in *Bowsher v. Synar*,[55] wherein at issue was the Gramm-Rudman-Hollings Deficit Reduction Act's provision that the Comptroller General annually collect an estimate of the amount of the relevant federal budget deficit and report to the President, who was then required to issue a sequestration order mandating the spending reductions specified by the Comptroller General. In invalidating this feature of the law, the Chief Justice concluded that the duties placed on the Comptroller General were executive in nature and thus prohibited under the separa-

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51. 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).
52. *Id.* at 411-12.
53. *Id.* at 424.
54. *Id.* at 422.
55. 478 U.S. 714 (1986).

tion-of-powers doctrine: "Congress in effect has retained control over the execution of the Act and has intruded into the executive function."[56] *Bowsher* underscored the foundational premise in our system of separated powers that the Article I branch may play no direct role in the execution of the laws, and both *Bowsher* and *Chadha* "can be viewed straightforwardly as efforts by the Court to keep the legislative branch within the constitutionally-prescribed ambit of its power."[57] In *Bowsher*, "a substantial national issue was quickly decided in an opinion that directly attacked the heart of the problem."[58] The exigencies of the moment, no matter how substantial or pressing, could not justify for Chief Justice Burger any compromise in the structure of government so carefully and wisely crafted by the Framers.

While Chief Justice Burger advocated and embodied common sense and practicality in his judicial decisionmaking, he resisted the temptation to use those virtues in derogation of the enumerated powers of a co-equal branch of government. In *Tennessee Valley Authority v. Hill*,[59] the Court affirmed a court of appeals' decision directing that a permanent injunction be issued against completion by the TVA of the Tellico Dam because that dam would destroy a three-inch-long fish, the snail darter. Writing for the Court, Chief Justice Burger began his analysis by stating that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer" than the Endangered Species Act's requirement that federal agencies not take any action to jeopardize the continued existence of an endangered species.[60] The Chief Justice rejected the dissent's call to fashion a remedy "'that accords with some modicum of common sense and the public weal'" as being an invitation to usurpation of power by the judiciary.[61] Recognizing the courts' limited role in our tripartite system, he emphasized that "[o]nce the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end."[62]

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56. *Id.* at 734.
57. Charles F. Lettow, *Looking at Federal Administrative Law with a Constitutional Framework in Mind*, 45 OKLA. L. REV. 5, 14 (1992).
58. MacKinnon, *supra* note 2, at 1001.
59. 437 U.S. 153 (1978).
60. *Id.* at 173.
61. *Id.* at 194 (quoting Powell, J., dissenting).
62. *Id.* at 194.

Indeed, the pragmatic and sensible Chief Justice knew that the courts could not be arbiters of constitutional principles by which they were unwilling to be governed—the courts could not exercise the prerogative secured by *Marbury v. Madison*[63] "to say what the law is" if they were unwilling to abide by that law.

TVA v. Hill has been described as "[t]he leading plain meaning case of the Burger Court."[64] Chief Justice Burger's opinion

> focused new attention on "plain meaning" as a key preferred basis for statutory interpretation where it was available. And, it reintroduced and reinvigorated separation-of-powers principles not only as providing standards for the Court's mediation of power and responsibility between the legislative and executive branches, but also as applying equally to the judicial branch's concomitant role.[65]

Throughout his tenure as Chief Justice, from *Nixon* to *Bowsher*, Warren Burger's sound leadership assured the preservation of the constitutional values essential to the functioning of our form of government and the safeguarding of our liberty.

V. INDIVIDUAL LIBERTIES

Despite his reputation as a "conservative," Chief Justice Burger was often a vigorous defender of individual liberties guaranteed by the Constitution. His strong commitment to the First Amendment values of freedom of speech and of the press was evident in many of his opinions.

For example, in *Wooley v. Maynard*,[66] the Chief Justice held that the State of New Hampshire could not compel one of its residents to carry on his license plate a slogan ("Live Free or Die") that was offensive to his deeply-held views. Noting that "the right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all,"[67] Chief Justice Burger opined:

> A system which secures the right to proselytize religious, political and ideological causes must also guarantee the

63. 5 U.S. (1 Cranch) 137, 177 (1803).
64. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 627 (1990).
65. Lettow, *supra* note 57, at 31.
66. 430 U.S. 705 (1977).
67. *Id.* at 714 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

> concomitant right to decline to foster such concepts. . . . [W]e are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." . . . The fact that most individuals agree with the thought of New Hampshire's motto is not the test . . . . The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.[68]

Maynard illustrates well Warren Burger's concern for individual freedom and sensitivity to the power of the state to encroach upon that freedom.

Similarly, Chief Justice Burger attached great importance to protecting a free and vigorous press, as well as to the responsible exercise of that great freedom.[69] Often called upon to reconcile conflicting constitutional rights, the Chief Justice resorted to fundamental principles. His opinions reflected an abhorrence of prior restraints.[70] In *Nebraska Press Ass'n v. Stuart*,[71] he ruled that judges may not prevent newspapers from publishing information about a crime when less drastic remedies are available to ensure a fair trial, and the openness of criminal trials to the public, including the press, was sustained by his opinion for the Court in *Richmond Newspapers, Inc. v. Virginia*.[72] Writing for the Court in *Landmark Communications, Inc. v. Virginia*[73] and in *Smith v. Daily Mail Publishing Co.*,[74] Chief Justice Burger sharply circumscribed the power of states to punish the publishers of information deemed to be highly sensitive or confidential. And the pivotal issue of a state-imposed right of access to the print media was resolved in favor of the press in the Chief

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68. *Id.* at 714-15 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

69. *See* Michael J. Wahoske, *Chief Justice Burger and Freedom of the Press*, 45 OKLA. L. REV. 121, 138 (1992).

70. *See, e.g.*, Organization for a Better Austin v. Keefe, 402 U.S. 417 (1971).

71. 427 U.S. 539 (1976).

72. 448 U.S. 555 (1980).

73. 435 U.S. 829 (1978).

74. 443 U.S. 97 (1979).

Justice's landmark opinion for a unanimous Court in *Miami Herald Publishing Co. v. Tornillo.*[75] While the press may have perceived or imagined Warren Burger to be antagonistic and at times unfairly characterized him as such, in fact the Chief Justice was a great champion of press freedom from governmental restraint and censorship, but he was also a fervent advocate for "the concomitant trust placed in the protected press to use that freedom responsibly and well . . . with some reasonable restraint of its own."[76]

To Chief Justice Burger, however, the Constitution was not value-free. He recognized that basic human decency inheres in ordered liberty, and that our freedoms are not absolute because there are limits beyond which we may not go without trampling on the rights of others.[77] The need to delineate such limits arose for the Chief Justice with respect to the problem of obscenity.[78] Attempts by the Supreme Court for several years to establish a workable definition of obscenity for First Amendment purposes had been inconclusive. In *Miller v. California,*[79] Chief Justice Burger tackled the issue and ended the uncertainty by crafting the common-sense definition of obscenity that we use today. Rejecting the "utterly without redeeming social value" standard set forth in *Memoirs v. Massachusetts,*[80] he made clear that obscenity was not to be judged by a uniform, national "community standard":

> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City. . . . People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.[81]

Rather, the Chief Justice held that juries should evaluate the

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75. 418 U.S. 241 (1974).

76. Wahoske, *supra* note 69, at 123, 125.

77. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973) (writing on behalf of the Court, Chief Justice Burger eloquently spoke of "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself").

78. Justice Harlan characterized the pornography issue as "intractable." Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting).

79. 413 U.S. 15 (1973).

80. 383 U.S. 413 (1966); *see also Miller,* 413 U.S. at 24-25 (rejecting *Memoirs* analysis).

81. *Miller,* 413 U.S. at 32-33.

essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the local community.[82] This forum-based test served as a reasonable, practical solution to a long-standing constitutional conundrum.

Issues of "church and state" afforded Chief Justice Burger the opportunity to pen some of his most significant and passionate opinions for the Court. The Chief Justice was a staunch defender of religious liberty. In *Wisconsin v. Yoder*,[83] he stood up for the rights of the Old Order Amish to carry on their traditions free from state compulsion with a vigor unsurpassed in any other Free Exercise Clause case. Likewise, in *McDaniel v. Paty*,[84] he struck down a state's ban on clergy as delegates to its constitutional convention, and, in *Thomas v. Review Board of the Indiana Employment Security Division*,[85] he upheld the right of a Jehovah's Witness to refuse to work in a weapons plant.[86] At the same time, Chief Justice Burger was attuned to the strictures of the Establishment Clause. In *Walz v. Tax Commission of New York*,[87] he repudiated the "no-aid" dicta of *Everson v. Board of Education*[88] and held that the Establishment Clause did not prevent a state from granting property tax exemptions to charitable institutions even if such exemptions provided an indirect economic benefit to religious organizations. However, in *Larkin v. Grendel's Den, Inc.*,[89] the Chief Justice struck down a state statute giving churches the right to veto liquor licenses, and in *Lemon v. Kurtzman*,[90] he formulated the three-part test that has since generally guided Establishment Clause analysis. With the Religion Clauses, Chief Justice Burger, as always, sought reasoned balance and was a painstaking student of history. Thus, relying on substantial historical evidence dating back to the Continental Congress, he wrote for the Court in *Marsh v.*

82. *Id.* at 30.
83. 406 U.S. 205 (1972).
84. 435 U.S. 618 (1978).
85. 450 U.S. 707 (1981).
86. *Id.* Chief Justice Burger was in dissent when the Court struck down an Alabama law providing for a moment of silence in the public schools. Wallace v. Jaffree, 472 U.S. 38, 84 (1985) (Burger, C.J., dissenting).
87. 397 U.S. 664 (1970).
88. 330 U.S. 1 (1947).
89. 459 U.S. 116 (1982).
90. 403 U.S. 602 (1971).

Chambers,[91] sustaining the Nebraska Legislature's practice of opening each legislative day with a prayer led by a chaplain paid by the State.

While by no means given to the profligate bestowing of constitutional rights and protections, Warren Burger was a resolute guardian of individual liberties. His basic concept of fairness was manifest in his judicial work product, as illustrated by his opinion for a unanimous Court in *Little v. Streater*,[92] recognizing the right of indigent defendants in paternity suits to state-subsidized blood tests. The strains of his respect for individualism, wariness of government power, and informed sense of history are readily apparent in the decisions that are his legacy.

VI. ISSUES OF PUBLIC DISCOURSE

Apart from his opinions, insight into Warren Burger as a jurist can also be gained through certain of his extrajudicial stances on matters of public import. His position on capital punishment clearly demonstrates his belief in the self-imposed cabining of judicial power. As a citizen, he was openly critical of the costs and skeptical of the deterrent effects of the death penalty; I heard him say often that if he were a legislator, he would never vote in favor of state-sponsored executions. However, as Chief Justice, he kept what Justice Jackson referred to as "the counsels of self-restraint"[93] and declined to vote his sympathies on the Court. He was convinced by the text of the Constitution and the considered actions of Congress and numerous state legislatures that he could not legitimately displace what the people through their elected representatives had seen fit to establish.[94]

Citizen Burger was also an ardent proponent of gun control. Although in perfect keeping with his common-sense approach to national issues, that position may confound those who inaccurately attempt to pigeonhole him as a doctrinaire conservative. He believed that gun-control opponents had exploited the

91. 463 U.S. 783 (1983).
92. 452 U.S. 1 (1981).
93. Robert H. Jackson, THE STRUGGLE FOR JUDICIAL SUPREMACY 321 (1941).
94. Kenneth W. Starr, *Chief Justice Burger's Contribution to American Jurisprudence*, 1986 SUPREME COURT HISTORICAL SOCIETY YEARBOOK, at 18, 22.

outdated "state militia" concerns underlying the Second Amendment to the detriment of America. While Chief Justice, he felt that he could not speak out publicly because Second Amendment issues could come before the Court and it would be inappropriate to use his office as a "bully pulpit" in such circumstances. However, after his active service on the Court, he courageously called for reasonable restrictions on the ownership of firearms to end the "mindless homicidal carnage" devastating the nation he loved.[95]

America's penal system was another subject of great interest to Warren Burger. He spent a lifetime analyzing correctional issues and comparing correctional facilities and policies throughout the world. As an admirer of the old-fashioned values of hard work, opportunity, self-discipline, and education, he actively urged the creation of realistic means for incarcerated individuals to learn and to develop useable skills. His dream of "factories within fences" in order to provide inmates with the tools necessary to become productive members of society was his practical solution to the enormous problem of recidivism.[96] This wise effort by the Chief Justice was borne of his recognition of the worth of every person and his pragmatic realization of the societal cost of simply abandoning or warehousing those who offend our criminal laws.

These extrajudicial positions serve to confirm the characteristics displayed by Chief Justice Burger on the pages of the United States Reports. He was a man of broad intellect and boundless energy who cared deeply about the complex challenges facing America.

VII. PERSONAL REFLECTIONS

In marking his passing, the *Harvard Law Review* made reference to the "personal generosity and kindness" of Chief Justice Burger.[97] I can attest to those virtues. My term with "the Chief" was filled with myriad examples of his courtesy and graciousness. He was most solicitous of me and my family when

95. Warren E. Burger, *The Right to Bear Arms*, PARADE MAG., Jan. 14, 1990, at 4, 6. It was vintage Warren Burger that he chose the vehicle of *Parade Magazine*, rather than some inaccessible scholarly journal, to deliver his message to the people.

96. Kenneth W. Starr, Introduction to Symposium, *The Jurisprudence of Chief Justice Warren E. Burger*, 45 OKLA. L. REV. 1, 3 (1992).

97. *In Memoriam: Warren E. Burger*, 109 HARV. L. REV. 1, 1 (1995).

my father-in-law died early in the Term, and he took time from his busy schedule to visit with my extended family when they toured the Court and to hold my two-year-old son on his lap. The Chief provided special opportunities for each of his law clerks; for me it was accompanying him on a weekend trip to West Point, where he basked in the chance to interact with students and faculty in lively discussions on the Constitution and American government. He was, at heart, a teacher of the principles that define this nation. Near the close of the Term, he took my wife and me with him as guests when he delivered the commencement address at my alma mater, The National Law Center of George Washington University, and included us at a small dinner party given in his honor following the ceremonies. My experience was typical. His relationship with his law clerks was more than just business—we were "family." We knew that he cared.

In the work of the Court, the law clerks were close at the Chief's side. He welcomed our views and reveled in the debate among us on the difficult cases confronting the Court. I always found him to be open-minded and willing to have his instincts challenged. He did not agree in every instance, but he did listen. He never asked his clerks to toe an ideological line, but he expected our loyalty. And we understood that the power to decide was his and his alone. Saturdays were devoted to work in the chambers, but the Chief would often provide a respite by preparing lunch for us (usually some kind of soup described by one of my co-clerks as "always unidentifiable, but always delectable"),[98] accompanied by his fascinating anecdotes and discussion of current events. He respected us as professionals—albeit neophytes—and he took seriously his role as mentor.

Give-and-take sessions on particular cases were often conducted one-on-one between the Chief and a law clerk. He would use this setting to discuss a bench memorandum prepared by a clerk in anticipation of the oral argument of a case, to work on revisions to a draft opinion in process, to analyze an opinion circulated by another Justice, to critique a memorandum regarding a pending petition for writ of certiorari, or to prepare for conference. Following the oral argument in one especially

98. John E. Sexton, *in A Tribute to Chief Justice Warren E. Burger*, 100 HARV. L. REV. 979, 980 (1987).

complicated case, the Chief invited me to have dinner with him at the Court and review the arguments and issues presented in anticipation of the Friday conference. We spent a delightful evening talking about the case, as well as many other topics, including life in Minnesota and my future plans. Late one day, when an opinion on which I had worked with the Chief garnered the votes of more than five Justices, he tracked me down at the "highest court" above the Supreme Court Library on which the law clerks play basketball and called me immediately to convey the good news. I was touched by his thoughtfulness. The Chief frequently would summon his law clerks together for an impromptu luncheon or afternoon tea where we would discuss the results of the Conference or upcoming arguments. In all of these interactions, the Chief's devotion to the law and to the Court was obvious.

When dealing with cases, the Chief demanded rigorous analysis from his law clerks. In opinions, he was insistent that the question presented for decision be articulated precisely and that the summary of the facts and procedural history be scrupulously accurate. As a lawyer, he knew only too well the disappointment that comes when an appellate court rules against your client based upon an erroneous reading of the record. He admired and required conciseness and clarity; he always sought to produce opinions that could be read and understood by the general public. For a young lawyer, the Chief's tutelage was invaluable.

I took away from my clerkship genuine amazement at the broad scope of the Chief's responsibilities. In addition to the heavy workload of the Court, he functioned as the principal administrative officer of the federal judicial system and devoted countless hours to improving the administration of justice in the United States. He chaired the Judicial Conference, monitored legislation affecting the judiciary, entertained visiting dignitaries, was a prolific speaker and writer on an array of important subjects, and was actively involved with the National Judicial College, the National Center for State Courts, the Institute for Court Management, and the Federal Judicial Administration Center. He served on the boards of the National Geographic Society and the Smithsonian Institution, and his dedication to the preservation of history led him to found the Supreme Court Historical Society and to create the position of curator at the

Supreme Court. His unflagging efforts bore much fruit; in the words of Chief Justice Vincent L. McKusick of the Maine Supreme Judicial Court, "Chief Justice Burger has done more than any other single person in history to improve the operation of all our nation's courts."[99]

When Chief Justice Burger retired in 1986 after seventeen years on the Court, some may have thought it odd that he would step down from this nation's highest judicial office to chair the Commission on the Bicentennial of the United States Constitution. At the time, he remarked that he thought it would be easier for the President to find a new Chief Justice than to convince someone else to organize and lead the Bicentennial celebration. He probably was right, but his unselfishness and sense of civic duty deserve immense respect. As head of the Bicentennial Commission, Warren Burger was engaged in a labor of love in his typical style. He did not succumb to those who called for erudite conferences and publications as the only fitting commemoration; he wanted a people's celebration, and he conducted a "national civics lesson" by handing out innumerable copies of the Constitution to schoolchildren and making that great charter of freedom come alive for all Americans. His spirited service truly enriched our heritage.[100]

VIII. CONCLUSION

Warren Burger was the personification of the Holmesian paradigm about the life of the law being experience rather than logic or theory.[101] He desired that the law be useful and relevant to society. He came to each case before the Court without any rigid ideology or preconceived determination, but strove to decide correctly each case on its own merits and to

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99. Vincent L. McKusick, Address at the Presentation of the Freedom's Foundation George Washington Award to Chief Justice Burger (Sept. 15, 1983); *see also* James F. Hogg, *Chief Justice Warren E. Burger—A Note*, 45 OKLA. L. REV. 161, 163-67 (1992) (describing the Chief Justice's contributions to court administration). In addition to all of Chief Justice Burger's official duties, the law clerks observed his zest for life: "We saw the wine connoisseur, the chef . . ., the artist, the sculptor, the naturist . . ., the antique buff, the humorist, and the political observer. We saw much more that, because of his [o]ffice, was regrettably hard for others to see. And as we watched, we caught his contagious enthusiasm for life." J. Michael Luttig, *supra* p. 32.

100. On the same day we celebrated the 200th anniversary of the Constitution, Warren Burger celebrated his 80th birthday.

101. Oliver W. Holmes, THE COMMON LAW 1 (1909).

decide no more than the case required. He had made his own way from humble beginnings, and thus he valued hard work and individualism. His independence made him impossible to predict or categorize; trite labels simply did not fit him, and he undoubtedly took some delight in from time to time confounding both his detractors and supporters alike. He was a man of "uncommon, common sense"[102] who looked for reasonable, practical solutions to problems, but he did not use pragmatism as a sword to carve into the province of other government branches. He had a profound understanding of history, realizing full well that the unelected federal judiciary as the intended "least dangerous" branch of government should remain so. Judge MacKinnon's words of tribute captured his essence: "He was one of that rare breed of jurists—a lawyer's Justice."[103] The Supreme Court, the judicial branch, and the nation are the better for Warren Burger's dedicated stewardship. His immeasurable contribution surely will endure.

102. J. Michael Luttig, *supra* p. 30.
103. MacKinnon, *supra* note 2, at 1001.